

A **MBf Factors Sdn Bhd v**
Ban Hoo Electrical & Furniture Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R1-12-404 OF
1998

KC VOHRAH J

B 25 OCTOBER 1999

Civil Procedure — Time — Computation of — Service of unsealed, unsigned and undated copy of notice of application and supporting affidavit — Delay in filing affidavit in reply — Whether time starts to run from date of service of affidavit on plaintiff, even when application which affidavit to be used in support is unsealed but only filed in court — Subordinate Court Rules 1980 O 24 r 4(2)(b)

C The defendant served an unsealed, unsigned and undated copy of a notice of application and its supporting affidavit — which had been filed in the sessions court — on the plaintiff on 11 June 1998. Thirty-three days after the date of service, on 14 July 1998, the plaintiff served its affidavit in reply on the defendant. A preliminary objection was taken by the defendant in the sessions court, relying on O 24 r 4(2)(b) of the Subordinate Court Rules 1980 ('the SCR'), to the admissibility of this affidavit in reply on the ground that it was filed out of time. The plaintiff, however, argued that the affidavit in reply was actually filed on time as it was filed 13 days after the sealed copy of the application and the supporting affidavit had been served on the plaintiff, well within the period of 14 days that was allowed. The judge of the sessions court allowed the objection of the defendant. Thus this appeal.

F **Held**, dismissing the appeal with costs:

The language of O 24 r 4(2)(b) the SCR is clear — that time starts to run from the date of the service of the affidavit on the plaintiff, even when the application which the affidavit to be used in support is unsealed but only filed in court (see p 723C); *Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd* [1997] 1 MLJ 581 followed; *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85 not followed.

[Bahasa Malaysia summary]

H Defendan telah menyerahkan satu salinan notis permohonan yang tidak bermeterai, ditandatangani dan bertarikh bersama-sama dengan affidavit sokongan notis itu — yang telah difailkan di mahkamah sesyen — ke atas plaintiff pada 11 Jun 1998. Tiga puluh tiga hari selepas tarikh serahan, pada 14 Julai 1998, plaintiff telah menyerahkan affidavit jawapannya ke atas defendan. Satu bantahan awal telah dikemukakan oleh defendan di mahkamah sesyen, bergantung kepada A 24 k 4(2)(b) Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR'), berhubung kebolehterimaan affidavit jawapan ini atas alasan ia telah

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difaikkan di luar tempoh masa. Plaintiff, bagaimanapun, telah mengemukakan alasan bahawa affidavit jawapan itu sebenarnya telah difaikkan di dalam tempoh masa kerana ia telah difaikkan 13 hari selepas salinan permohonan yang dimeteraikan dan juga affidavit sokongannya diserahkan kepada plaintiff, di dalam tempoh 14 hari yang dibenarkan. Hakim mahkamah sesyen membenarkan bantahan defendan itu. Oleh itu, rayuan dibuat.

Diputuskan, menolak rayuan dengan kos:

Perkataan A 24 k 4(2)(b) KMR adalah jelas — bahawa tempoh masa bermula daripada tarikh serahan affidavit dibuat ke atas plaintiff, walaupun permohonan di mana affidavit menyokong tidak dimeteraikan tetapi hanya difaikkan di mahkamah (lihat ms 723C); *Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd* [1997] 1 MLJ 581 diikuti; *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85 tidak diikuti.]

Notes

For cases on computation of time, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4849–4850.

Cases referred to

Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong [1996] 3 MLJ 85 (not folld)

Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd [1997] 1 MLJ 581 (folld)

Legislation referred to

Rules of the High Court Rules 1980 O 32 r 13(2), O 26A r 3(1), O 32 r 13(2)

Subordinate Court Rules 1980 O 24 rr 1(1), 4(2)(b)

Kingston Tan (HQ Kwong with him) (Heiley Hassan Tan & Partners) for the appellant.

KC Ang (CP Ang & Co) for the respondent.

Cur Adv Vult

KC Vohrah J: The appellant ('the plaintiff') filed an affidavit in reply to the affidavit supporting an application by the respondent ('the defendant') to transfer the summon case filed by the plaintiff from the Kuala Lumpur Sessions Court to the Alor Setar Session Court.

The unsealed, unsigned and undated copy of the notice of application and the supporting affidavit, which had been filed in the sessions court, were served on the plaintiff on 11 June 1998.

A Thirty-three days after this date of service, on 14 July 1998, the affidavit in reply of the plaintiff was served on the respondent. A preliminary objection was taken by the defendant in the sessions court, relying on O 24 r 4(2)(b) of the Subordinate Court Rules 1980 ('the SCR'), to the admissibility of this affidavit in reply on the ground that it was filed out of time. The plaintiff, however, argued that the affidavit in reply was actually
B filed on time as it was filed 13 days after the sealed copy of the application and the supporting affidavit had been served on the plaintiff, well within the period of 14 days that was allowed. The judge of the sessions court rejected the argument of the plaintiff and allowed the objection of the defendant. Thus this appeal.

C I think the language of O 24 r 4(2)(b) the SCR is clear — that time starts to run from the date of the service of the affidavit on the plaintiff, even when the application which the affidavit to be used in support is unsealed but only filed in court. Case law, the Court of Appeal case of *Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd* [1997] 1 MLJ 581 ('the *Structural Concrete* case') relating to the equipollent provision, O 32 r 13(2)
D of the Rules of the High Court Rules 1980 ('the RHC'), establishes that time runs not from the date of service of the summons in chambers which has been sealed but from the date of service of the summons in chambers which has been filed.

The application in the instant case, although heard in open court, was
E an application which should have been heard in chambers (see O 24 r 1(1) of the SCR), unlike an application for summary judgment under O 26A which must be heard in open court (see O 26A r 3(1)). And O 24 r 4(2) applies to an application in chambers.

There is a later Court of Appeal case *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85 ('the *PNISB* case') which states that
F time for the party who wishes to make an affidavit in reply starts to run after the service of the sealed copy of the summons in chambers. If the decision is followed, then the affidavit in reply of the plaintiff was filed within time as it was filed within the 14 days of the service of the sealed copy.

The *PNISB* case was decided about two months after the *Structural Concrete* case was decided by a different panel of the Court of Appeal and
G the *Structural Concrete* case was obviously not brought to the attention of the later panel of the Court of Appeal. The Court of Appeal in the *Structural Concrete* case had in fact examined the High Court decision in the *PNISB* case and disagreed with the decision and stated, reluctantly and with regret I believe, in regard to O 32 r 13(2) of the RHC (the equipollent provision
H of O 24 r 4(2) of the SCR) at p 586:

However, we would like to add that the critical words in O 32 r 13(2) for the purposes of computation are, 'within 14 days from the date of the filing of the application'.

I Accordingly, time is to run not from the date on which the application is sealed but the date on which the application is filed.

With respect, if the Court of Appeal in the *PNISB* case, following the best traditions of judicial thinking and compelling philosophy and syllogism for

its decision, had been made aware of the Court of Appeal decision in the *Structural Concrete* case, I think, the *PNISB* case would have been decided differently; it is a matter of the express language of written law that overrides other considerations, however compelling, that must prevail.

The date of the filing in court of the application which the affidavit is intended to support has been made statutorily pivotal for the purpose of reckoning the validity period of the service on the opposite party and it follows that the defendant's objection to the plaintiff's affidavit in reply for being filed out of time was validly taken in the sessions court.

The defendant did file an affidavit in reply. Did he take a step in the proceedings and waive the non-compliance of O 24 r 4(2)? I think not; the deponent of the affidavit filed by the defendant did state that he was making the affidavit without prejudice to the preliminary objection made earlier to the court. Appeal is dismissed with costs.

Appeal dismissed with costs.

Reported by Loo Lai Mee

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